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Admitted in New York and New Jersey

December 28, 2023

## **VIA E-Mail**

Hon. Freda L. Wolfson, U.S.D.J. (ret.) Lowenstein Sandler LLP One Lowenstein Drive Roseland, New Jersey 07068

> Re: Johnson & Johnson Health Care Systems, Inc. v. Save On SP, LLC No. 2:22-cv-02632 (ES) (CLW)

Dear Special Master Wolfson:

Defendant Save On SP, LLC ("<u>SaveOn</u>") submits this letter pursuant to Your Honor's request during the status conference on December 21, 2023.

The November 7 Order did not decide SaveOn's motion to compel Plaintiff Johnson & Johnson Health Care Systems, Inc. (with its affiliates, "<u>J&J</u>") to designate additional custodians as to five custodians. Dkt No. 165. As SaveOn noted in the December 21 conference, after it

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<sup>&</sup>lt;sup>1</sup> The Court's November 7, 2023 Order required J&J to add six of seven custodians identified in that Order. Dkt No. 173 at 2. Where the Court denied requests for relief in the November 7 Order, it did so explicitly. Dkt. No. 173 at 2 ("SaveOn's request for relief set forth in Docket Entry No. 162 is DENIED"). In addressing SaveOn's motion regarding additional custodians, in contrast, the

submitted its motion, J&J and third parties produced additional documents confirming the relevance of four of those custodians: Scott White, Blasine Penkowski, Karen Lade, and Juliette Deshaies.

This new evidence demonstrates that:

- White and Penkowski discussed whether SaveOn's services purportedly violate CarePath's terms and conditions—which goes to J&J's understanding of those provisions (which J&J unilaterally drafted), the disputed meaning of which is at the heart of J&J's claim that SaveOn induced plan members to violate them.
- Lade was involved with telling patients about accumulators, maximizers, and SaveOn in 2018 but did not tell them that those services violated CarePath's terms and conditions—which goes to J&J's claim that SaveOn's conduct violates those contract terms and SaveOn's defense that J&J's claim is a recently concocted, made-for-litigation position.
- White and Penkowski were counterparties for J&J on contracts with TrialCard, the J&J vendor that administered the CarePath Program, so had authority over CarePath's payments to patients via TrialCard—which goes to J&J's allegations that SaveOn caused it to make increased payments that injured it and threatened CarePath's financial viability and to SaveOn's defenses that J&J's own CarePath budget was the cause of these payments (not SaveOn) and that J&J could continue

Court stated that it "will require" J&J to add six additional custodians but said nothing regarding the other five requested custodians.

making CarePath payments.

Penkowski and Lade were involved with J&J's earliest formulation of a response
to SaveOn's services—which goes to SaveOn's defense that J&J could have reduced or stopped payments to patients on SaveOn-advised plans but did not, thus

failing to mitigate J&J's damages.

• White and Deshaies know that CarePath is a marketing program that generates a return for J&J by selling more drugs and raising drug prices (by making patients less cost sensitive to drug costs)—which goes to SaveOn's defenses that SaveOn's conduct does not threaten CarePath's financial viability, and that helping more patients enroll in CarePath financially benefits J&J (offsetting some or all of its alleged injury and damages), and any harm to CarePath is a commercial harm and not a public harm under the GBL.

The details follow.

White and Penkowski met with third party Archbow Consulting in January 2022, a few months before J&J filed this lawsuit,

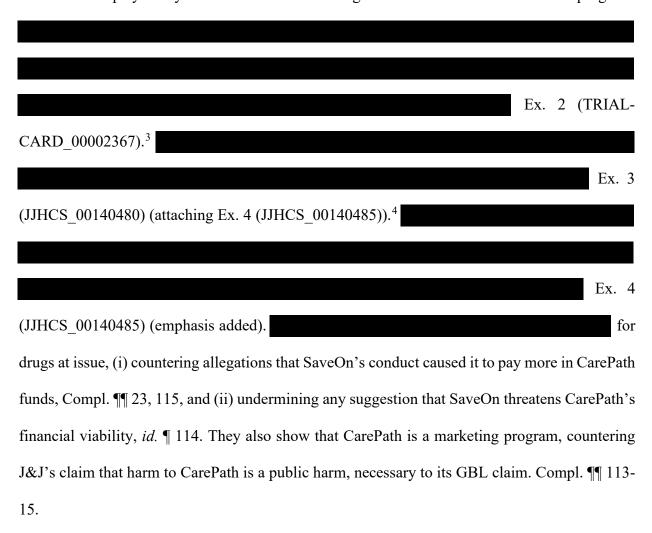
. The document that shows this, Exhibit 1 (ARCHBOW 000443), 2 produced by Archbow, is the earliest document produced from before

the filing of this lawsuit that reflects any understanding by J&J that SaveOn purportedly induced

<sup>2</sup> Archbow produced this document on October 30, 2023 following the Court conference on SaveOn's motion.

breaches of CarePath's terms and conditions. The document's context strongly indicates that this was a made-for-litigation position. It is relevant when and why White and Penkowski formed that understanding on behalf of J&J, which they then shared outside of J&J.

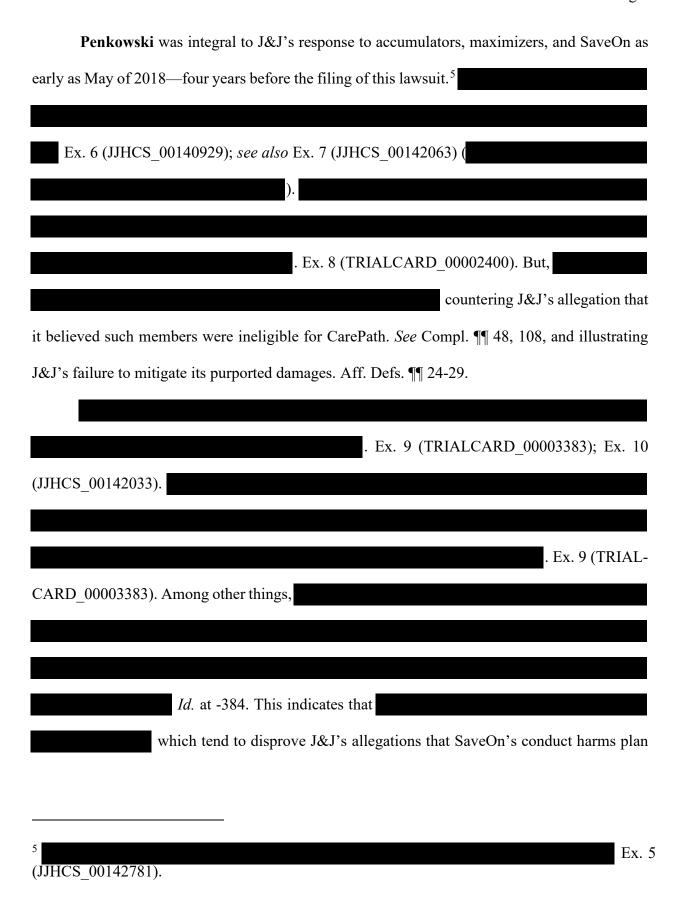
White played key roles with CarePath's budget and J&J's "investment" in that program.



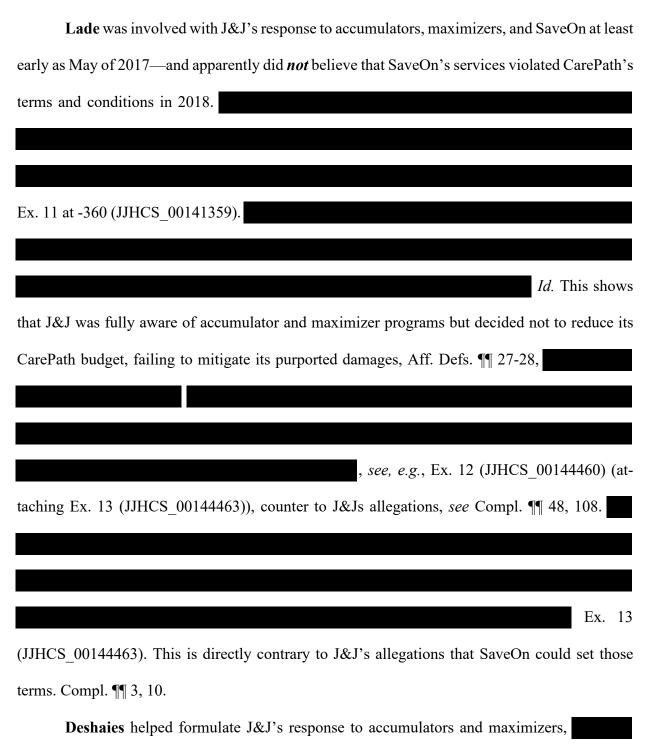
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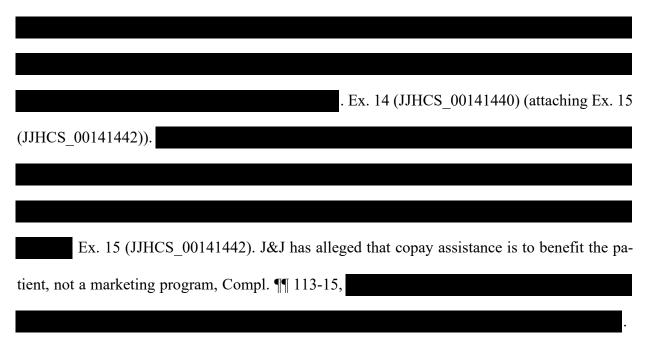
<sup>&</sup>lt;sup>3</sup> All documents with the Bates TRIALCARD\_cited in this letter were produced by TrialCard on October 27, 2023—after the submission of SaveOn's motion to compel.

<sup>&</sup>lt;sup>4</sup> All documents cited from J&J's production, with the Bates JJHCS\_, were produced by J&J on December 22, 2023.



members, Compl. ¶ 114, and that the so-called "SaveOnSP Program" is different from plan benefit design, Compl. ¶¶ 1, 3. Further, it bolsters SaveOn's defense that J&J failed to mitigate its damages, Aff. Defs. ¶¶ 24-29.





These documents confirm the relevance of these four individuals, whom the Special Master should compel J&J to designate as custodians, running all agreed or ordered search terms from April 1, 2016 to November 7, 2023. SaveOn stands on its prior motion as to Ernie Knewitz.

SaveOn appreciates the Court's attention to this matter.

Respectfully submitted,

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## EXHIBITS 1-15 CONFIDENTIAL – FILED UNDER SEAL